



1982

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Recommended Citation

VanMeter, Laurance B. (1982) "Abandonment and Forfeiture of Coal Leases in Kentucky," *Kentucky Law Journal*: Vol. 71 : Iss. 1 , Article 10.
Available at: <https://uknowledge.uky.edu/klj/vol71/iss1/10>

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Abandonment and Forfeiture of Coal Leases in Kentucky

INTRODUCTION

The importance of the coal industry to the economies of Kentucky and the United States is obvious. It is one of Kentucky's most vital industries,¹ and is widely viewed as an energy source which in years to come will help decrease American dependence on foreign oil.² The coal lease plays a major role in the development of coal properties; through the lease, owners who are unable to mine can transfer mineral rights to lessees who have the present capacity and resources to extract the mineral.³

This development scenario, however, is interrupted when a lessee either ceases to mine or operates in a manner prohibited by the lease. In the first instance, no mineral is produced, the lessor receives no royalty and the outstanding lease becomes an encumbrance on the lessor's title and an impediment to the execution of a later lease to one who *will* mine. In the second instance, some coal probably is produced, but in all likelihood, coal that should be mined is not extracted or is damaged so as to be rendered unmineable in the future. The lessor does not receive the royalty he or she should, and the property is not developed to the fullest extent possible. In both instances, development is impeded.

To deal with these situations of inadequate coal development, courts have applied the concepts of abandonment and forfeiture as a means by which lessors may recover leaseholds. "Abandonment" is the "[v]oluntary relinquishment of all right, title, claim and possession, with the intention of not reclaiming it."⁴ "Forfeiture," on the other hand, is the loss of a right "by the

¹ In 1981, 157.5 million tons of coal were produced by Kentucky mines. In fact, Kentucky has been the leading coal-producing state in the nation for the past nine years. Mueller, *State's No. 1 Ranking in Coal is Threatened*, Lexington Herald, Sept. 21, 1982, at 1, col. 5.

² 3 DEPT. OF ENERGY, ENERGY INFORMATION ADMINISTRATION, ANNUAL REP. TO CONGRESS xii (1980).

³ See *Swiss Oil Corp. v. Hupp*, 69 S.W.2d 1037 (Ky. 1934) (a coal lease is a conveyance of absolute title to such minerals under the surface).

⁴ BLACK'S LAW DICTIONARY 2 (5th ed. 1979).

commission of a crime or fault or the losing of something by way of penalty.”⁵ The difference, therefore, between the two principles is that one is a voluntary relinquishment by the lessee and the other is not. Despite this basic distinction, abandonment and forfeiture, as applied to coal leases in Kentucky, are often treated as synonyms,⁶ or an action for one is brought when an action for the other is proper.⁷ This confusion has its roots in early decisions by Kentucky’s highest court, which used the words “abandonment” and “forfeiture” almost interchangeably.⁸ This Note, recognizing at its outset the basic distinction between the two principles, will attempt to present Kentucky law as to abandonment and forfeiture of coal leases.⁹

I. ABANDONMENT OF COAL LEASES

Kentucky courts adhere to the rule that abandonment “consists of two elements: 1) voluntary, actual relinquishment of possession, and 2) intent to repudiate ownership.”¹⁰ The party asserting abandonment has the burden of proving “the same by clear, unequivocal and decisive evidence.”¹¹ This rule for deter-

⁵ *Id.* at 584.

⁶ See *Nally v. Edwards*, 279 S.W.2d 251 (Ky. 1955). *Edwards* asserted that *Nally* and another had abandoned and forfeited their interests.

⁷ See *Reis v. Norton Coal Corp.*, 346 S.W.2d 8 (Ky. 1961). The Court held that the lessee had not abandoned the lease. The lessor elected not to proceed under the forfeiture clause of the lease. *Id.* at 9.

⁸ See, e.g., *Eastern Ky. Mineral & Timber Co. v. Swann-Day Lumber Co.*, 146 S.W. 438 (Ky. 1912). At one point in its opinion, the Court stated that the lessees had a duty to begin mining “within a reasonable time under pain of forfeiture or abandonment [of] the development of the estate granted.” *Id.* at 442.

⁹ The Kentucky courts have generally treated oil and gas leases and coal leases similarly with respect to abandonment and forfeiture; however, some discrepancies do exist due to basic differences in the physical properties of the two classes of minerals. For an overview of the Kentucky law on abandonment and forfeiture of oil and gas leases, see *Cameron v. Lebow*, 338 S.W.2d 399 (Ky. 1960), *aff’d on other grounds*, 366 S.W.2d 164 (Ky. 1962), *rev’d on other grounds*, 394 S.W.2d 773 (Ky. 1965). Kentucky courts have not made any legal distinction between coal leases and leases for other hard minerals.

¹⁰ *Ellis v. McCormack*, 218 S.W.2d 391, 392 (Ky. 1949) (citing 1 AM. JUR. *Abandonment* §§ 8, 14 (1948)).

¹¹ *Elk Horn Coal Corp. v. Allen*, 324 S.W.2d 829, 831 (Ky. 1959); *Cameron v. Lebow*, 366 S.W.2d at 164. See notes 19-21 *infra* and accompanying text for a discussion of *Cameron*.

mining abandonment would appear fairly straightforward, lending itself to ease of application. In fact, the first element rarely presents a problem.¹² Either the lessee is on the property mining, or preparing to mine, or is not. However, courts have had difficulty with the second element, intention to abandon. This difficulty is not surprising, because proof of intention involves the proof of a state of mind, which often can be proven only by circumstantial evidence. Over the years, the Kentucky courts have recognized several examples of circumstantial evidence which indicate an intent on the part of the lessee to abandon the coal lease.

The most obvious indication of intent to abandon is lengthy continued absence. In *Ellis v. McCormack*,¹³ the Court stated that “[l]apse of a long time after relinquishment of possession is significant evidence of the intention to abandon.”¹⁴ In *Ellis*, the Court held that the lessee had abandoned the property and coal he had actually mined, because he had sold most of his mining equipment to the lessor and did not assert ownership for seven years.¹⁵ In *United Mining Co. v. Morton*,¹⁶ the Court held that the plaintiff’s five-year absence constituted an abandonment of his interest.

The question arises as to how long a time must pass before the lessee can be held to have abandoned the lease. In Kentucky, this question has no answer. The courts have consistently stated that “[m]ere lapse of time and nonuser [sic], unaccompanied by any other evidence showing intention,”¹⁷ are not enough to constitute an abandonment.¹⁸ This rule was carried to an outrageous

¹² The lessee’s absence may present an issue when the lessee is not mining the particular leasehold, but rather is mining an adjacent tract of land. See *Drake v. Black Diamond Coal Mining Co.*, 279 S.W. 952 (Ky. 1926) (lessee held not to have abandoned because of intent to mine the coal through mine shafts on adjacent property).

¹³ 218 S.W.2d at 391.

¹⁴ *Id.* at 392. The Court had earlier stated that it was possible to infer intention from relinquishment of possession “where the facts justify it.” *Id.* It would seem that the only situation in which this inference is justifiable is when the lessee has been absent for a long period of time.

¹⁵ In a similar case, the Court held that the lessee had not abandoned the property where the absence had been a mere eight months. *Nally v. Edwards*, 279 S.W.2d at 251.

¹⁶ 192 S.W. 79 (Ky. 1917).

¹⁷ *Elk Horn Coal Corp. v. Allen*, 324 S.W.2d at 830.

¹⁸ See *Rice v. Rice*, 50 S.W.2d 26, 30 (Ky. 1932).

extreme in *Cameron v. Lebow*¹⁹ in which the lessee was held not to have abandoned an oil and gas lease,²⁰ even though the lessee had not developed the property for more than sixteen years. The Court apparently reached this result because no evidence existed, other than the passage of time, which indicated an abandonment.²¹ Since lapse of time alone does not show an intent to abandon, it is necessary to ascertain other "facts and circumstances" which will prompt a court to rule that a coal lease has been abandoned.²²

In *Kentucky Coke Co. v. Smith*,²³ cessation of work in addition to the passage of time led the Court to hold that the lessee had abandoned the lease. However, the Court devoted much of its opinion to the lessee's argument that the lessor had given no notice of an intention to have the lease *forfeited* for failure to develop.²⁴ The Court also spoke of the enforceability of unilateral, executory contracts;²⁵ some doubt exists as to whether the Court cancelled the lease because it had been abandoned or because it was an unenforceable, unilateral contract.²⁶ However, the Court stated:

The rule with respect to cesser of work after operations begun [sic] is much the same with respect to coal leases as with oil

¹⁹ 366 S.W.2d at 164.

²⁰ The Kentucky courts have applied the same rules in abandonment cases whether the lease was for coal or for oil and gas.

²¹ The Court refused to find abandonment despite an earlier statement in the opinion that "in view of the nature and purpose of an oil and gas lease and the practical necessities for expeditious development, the fact of abandonment may be more readily found than in other legal relationships." *Id.* at 165. In light of this statement and the Court's finding that the lease had not been abandoned, the present usefulness of the doctrine of abandonment to recapture a coal leasehold must be seriously questioned.

²² Abandonment is "to be determined in each case upon the surrounding facts and circumstances." *Id.* at 166. See *Browning v. Cavanaugh*, 300 S.W.2d 580, 582 (Ky. 1957); *Rice v. Rice*, 50 S.W.2d at 30.

²³ 269 S.W. 558 (Ky. 1925).

²⁴ *Id.* at 559. Here, again, the confusion as to the principles of abandonment and forfeiture is evident. See text accompanying notes 69-84 *infra* for a discussion of the requirement of notice as a condition precedent to forfeiture.

²⁵ See notes 71 & 72 *infra* and accompanying text for a discussion of the Kentucky rule as to the cancellation of unilateral, executory coal leases.

²⁶ 269 S.W. at 560. "When the mining ceased, the consideration ceased, and either party was, under the terms of the lease, entitled to abandon it at pleasure, because it was not enforceable against either." *Id.*

and gas leases. "Cesser of work will operate as a termination of a lease by abandonment, especially where the first or second well proves to be a dry one. Thus, where a lease was for 15 years, and as much longer as oil or gas is found in paying quantities, and the lessee erected a 'rig', drilled a test well, but obtained no oil, and thereupon removed the machinery used in drilling, leaving nothing but a wooden tank, which rotted, asserting no title to the premises for nine years," it was held that the lease had been abandoned²⁷

In *Kentucky Coke*, the lessee had mined for fifteen years but ceased, and the leasehold lay unworked for more than twenty years. This period of inactivity in addition to the cessation of work clearly indicated an intention to abandon the coal lease.²⁸

Another indication of an intent to abandon is the declaration of the lessee. In *Rice v. Rice*,²⁹ the Court found that a letter from the lessee to the lessor manifested an intention to abandon the coal lease.³⁰ The Court held:

His letter, together with his actions showing the absence on his part of any attention to, interest or concern in, the lease and the operations thereunder, are sufficient to authorize the conclusion that he had abandoned the lease prior to the time [the lessor] re-entered and took possession of the premises, and that [the lessee] had no intention of again resuming operation of the mine and the development of the lease.³¹

Such declarations of the lessee are more reliable evidence of intention than are passage of time or cessation of work. The moment the lessee sent the letter, he had abandoned the lease.³²

²⁷ *Id.* (citing 1 THORNTON, THE LAW OF OIL AND GAS 262 (1918)).

²⁸ 269 S.W. at 558. A more recent case in which the lessee's cessation of operation was held to result in abandonment is *Browning v. Cavanaugh*, 300 S.W.2d at 580 (abandonment of an oil and gas lease).

²⁹ 50 S.W.2d at 26.

³⁰ According to the opinion, the lessee proposed in the letter that:

[I]f [the lessor] would prepare a lease for the property covered by the present lease, making its terms such that he could afford to develop the mine, and at a price that he could afford to mine the coal for market, he [the lessee] "would arrange to get the plant started without any delay and do everything to make the mine and property worth while."

Id. at 29.

³¹ *Id.*

³² The Court stated that "[i]n the case of true abandonment the lessee's title is gone

Termination of corporate existence also indicates an intention to abandon a coal lease. Although Kentucky does not follow the common law rule that a corporation's dissolution automatically extinguishes a lease to the corporation,³³ such dissolution in combination with other circumstances, such as the passage of time and removal of equipment, may result in an abandonment. In *Barrowman Coal Corp. v. Kentland Coal & Coke Co.*,³⁴ the Court was satisfied that the stockholders of the corporate lessee had abandoned the lease on the basis of facts similar to those set forth above.³⁵ As a practical matter, finding intention to abandon because of termination of corporate existence has limited application since corporations may be perpetual in existence,³⁶ and few corporate charters have express termination dates.

One important situation exists in which the lessee will not be held to have abandoned the lease. No abandonment will be found in Kentucky where the lessee continues "to pay minimum royalties in a substantial amount."³⁷ The West Virginia Supreme Court reached the same result in the recent decision of *Iafolla v. Douglas Pocahontas Coal Corp.*³⁸ That court qualified its ruling by stating: "We can envisage a situation in which a contract of this nature might, by virtue of changed circumstances unforeseen by either of the contracting parties become 'so unfair and uneven as to render its enforcement equivalent to the perpetration of fraud upon the lessors.'"³⁹

Kentucky would appear to be in line with this statement by

the minute he determines to give up the property and does some act in pursuance to that intention." *Id.* at 30. In fact, in *Rice*, the lessee had only had possession of the lease a little over three years when he wrote the letter to the lessor. *Contra Ellis v. Brown*, 177 F.2d 677 (6th Cir. 1949) (declaration of lessee that he "didn't want any part of it" held not to manifest an intention to abandon).

³³ *Shadoin v. Sellars*, 4 S.W.2d 717, 719 (Ky. 1928).

³⁴ 196 S.W.2d 428 (Ky. 1946).

³⁵ The corporation's charter expired, the mining equipment was removed and the stockholders of the corporation did not exert ownership over the property for two years. *Id.* at 430-31.

³⁶ KY. REV. STAT. § 271A.270(1)(b) (Bobbs-Merrill 1972).

³⁷ See *Reis v. Norton Coal Corp.*, 346 S.W.2d 8, 9 (Ky. 1961). The Court stated, "We can find no basis for an implication of an intent to abandon on the part of a lessee who is continuing to pay substantial minimum royalties." *Id.*

³⁸ 250 S.E.2d 128 (W. Va. 1979).

³⁹ *Id.* at 133 (quoting *Lawther Oil Co. v. Guffey*, 43 S.E. 101, 102 (1902)).

the West Virginia court, as evidenced by the words "substantial minimum royalties" found in the opinion of *Reis v. Norton Coal Corp.*⁴⁰ However, Kentucky also adheres to a rule that consideration as little as one dollar per acre is sufficient to make a contract enforceable,⁴¹ so that as long as the lessee pays the minimum royalty provided in the lease, the lessee cannot be said to have manifested an intention to abandon the lease.

If a lessee does abandon the lease, the lessor has two remedies. First, the lessor may re-enter and take possession of the premises. In *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.*,⁴² responding to the lessee's argument that the lessor's remedy was to bring suit for specific performance or for cancellation of the lease, the Court stated:

[T]he grantor may re-enter and take possession of the premises as if no conveyance had been executed. There is no sound reason why he may not peaceably obtain possession of his property without resorting to other remedies given by the law. He has the right to peaceably and quietly do that which the judgment of the court would give him the right to do. His entry does not prejudice the rights of the grantee; as, if it is wrongful, he may be successfully proceeded against as a trespasser.⁴³

The second remedy of the lessor is an action for cancellation of the lease which will remove the encumbrance on the title to the property. The lessor cannot demand damages if he or she seeks cancellation of the lease.⁴⁴

II. ABANDONMENT DUE TO EXHAUSTION OF COAL

In several cases, Kentucky's highest court has spoken of the

⁴⁰ See 346 S.W.2d at 9.

⁴¹ See *L.E. Cooke Corp. v. Hayes*, 549 S.W.2d 837 (Ky. Ct. App. 1977), *appeal dismissed*, 572 S.W.2d 421 (Ky. 1978). The court stated that "[w]here consideration is good and sufficient (and one dollar per acre per year is) then rights relative to termination may be expressly contracted by either party without bringing such instruments under the unilateral rule." *Id.* at 838. See also *Cleveland Wrecking Co. v. Aetna Oil Co.*, 154 S.W.2d 31 (Ky. 1941).

⁴² 146 S.W. at 438.

⁴³ *Id.* at 443.

⁴⁴ See *Baltimore Trust Co. v. Norton Coal Mining Co.*, 25 F. Supp. 968, 972 (W.D. Ky. 1939). The court stated that "under well recognized authorities the complainant . . . could not ask a cancellation of the lease and at the same time claim royalties." *Id.*

abandonment of a lease due to the exhaustion of coal underlying the property.⁴⁵ However, these cases did not concern the voluntary relinquishment of possession accompanied by an intention to give up the claim and right of property. Rather, the leases involved in these cases contained specific provisions providing for the termination of the lease due to the exhaustion of a certain quantity and quality of coal. In other words, the controversies arose from the terms of the lease.

The rule developed from this line of cases is that "[t]he exhaustion of the minable [sic] coal in the land must . . . be held to have the effect of terminating the contract."⁴⁶ Clearly, the lease controls as to whether the coal for which the parties contracted has been mined. The issues in the cases stem from a condition placed on the quality of coal to be mined, such as "all mineable and merchantable coal." The court's interpretation of this condition determines whether the lessee is still obligated to the lessor.⁴⁷

⁴⁵ See, e.g., *Hall v. Eversole's Adm'r*, 64 S.W.2d 891 (Ky. 1933); *Auxier Coal Co. v. Big Sandy & Millers Creek Coal Co.*, 238 S.W. 189 (Ky. 1922); *Tichenor v. McHenry Coal Co.*, 215 S.W. 799 (Ky. 1919).

⁴⁶ *Auxier Coal Co. v. Big Sandy & Millers Creek Coal Co.*, 238 S.W. at 191. The Court further stated that "[a]ny other construction would be unjust and would violate the proclaimed purpose of the lease." *Id.*

⁴⁷ See, e.g., *Howard v. Hi Hat Elkhorn Mining Co.*, 295 F.2d 81, 82 (6th Cir. 1961) (lease obligation limited to the mining of "mineable and marketable coal;" lessee not obligated to lessor); *Oates v. S.J. Groves & Sons Co.*, 248 F.2d 388 (6th Cir. 1957) (*per curiam*) (coal found to be unmarketable); *Walter Bledsoe & Co. v. Elkhorn Land Co.*, 219 F.2d 556, 558 (6th Cir. 1955) (there was "merchantable and mineable coal in the property at the time the lease was purchased"); *Kentucky & W. Va. Coal & Mining Co. v. Blue Diamond Coal Co.*, 106 F. Supp. 274, 277 (E.D. Ky. 1952) (preponderance of the evidence established there was no "mineable and merchantable coal" underlying the leased premises; lessee entitled to declare lease terminated); *Martin's Fork Coal Co. v. Harlan-Wallins Coal Corp.*, 14 F. Supp. 902, 908 (E.D. Ky. 1934), *aff'd*, 83 F.2d 967 (6th Cir. 1936) (the undertaking of the lessee to mine and pay royalty on all "workable and merchantable coal" on the leased premises was limited to coal that could be mined and sold at a profit under ordinary or average conditions); *Browning v. Mountain States Coal Corp.*, 338 S.W.2d 200 (Ky. 1960) (lessee held obligated to pay minimum royalty on merchantable coal despite falling coal market); *Winco Block Coal Co. v. Evans*, 76 S.W.2d 241, 244 (Ky. 1934) (exhaustion of "workable and marketable coal" entitled lessee to terminate lease and discontinue the payment of minimum royalties); *Hall v. Eversole's Adm'r*, 64 S.W.2d at 891 (lessee held obligated to pay minimum royalty on merchantable coal); *Powers v. Mahan-Jellico Coal Co.*, 51 S.W.2d 946, 948 (Ky. 1932) (lessee did not have unqualified and arbitrary right to abandon and cancel the lease under provision of lease as to "faulty or irregular coal"); *Laurence E. Tierney Land Co. v. Kingston-Poca-*

An exception to the rule that the lessee is not liable for the minimum royalty if the coal has been exhausted arises when the lessee retains possession of the leased property. In *Gambill's Administrator v. Ellser Coal Co.*,⁴⁸ the Court stated that "even where the coal is exhausted, the lessee is not released from liability for the fixed rental or royalty based on minimum production if he retains possession of the premises for some purpose under the lease . . . , although the purpose for which it is retained is not a mining purpose."⁴⁹ However, the lessee will not be liable for the minimum royalty, even if he retains possession of the property, if the lease itself prescribes that no minimum royalty should be paid in such a case.⁵⁰

III. FORFEITURE OF COAL LEASES

Like abandonment due to exhaustion of coal, forfeiture of a mineral lease will arise, if at all, under the terms of the lease. In fact, the Kentucky courts follow the well-established rule that "no forfeiture will be decreed for a breach of the terms of a lease in the absence of a forfeiting clause."⁵¹ The reason for this rule is

hontas Coal Co., 43 S.W.2d 517 (Ky. 1931) (lessee held obligated to pay royalty on mineable coal).

A complete analysis of the term "mineable and merchantable coal" is beyond the scope of this Note.

⁴⁸ 20 S.W. 2d 286 (Ky. 1929).

⁴⁹ *Id.* at 287 (citations omitted). *Accord* Saylor v. Howard, 18 S.W.2d 279, 280 (Ky. 1929) ("[r]oyalties contracted to be paid the lessor for the use of coal property are regarded in this state as rents").

⁵⁰ *See* Hall v. Landrum, 470 S.W.2d 830, 831-32 (Ky. 1971).

⁵¹ *Continental Fuel Co. v. Haden*, 206 S.W. 8, 10 (Ky. 1918). *See also* Duff v. Duff, 265 S.W. 305, 306 (Ky. 1924); *Ross v. Sheldon*, 119 S.W. 225, 228 (Ky. 1909). In a case where the lease does not contain a forfeiture clause, the lessor's remedy is a common law action for damages. 265 S.W. at 306. Although the lease may not be forfeited, the lessee still has a duty of reasonable compliance with the terms of the lease. 119 S.W. at 228. *But see* *Eastern Ky. Mineral & Timber Co. v. Swann-Day Lumber Co.*, 146 S.W. at 438.

That Court stated:

We will read into the contract such terms and conditions as the contract and the circumstances surrounding its execution warrant us in assuming were in the minds of the parties when it was entered into. So interpreting it, we are well satisfied that it should be read as if there had been inserted in it, in apt terms, a condition imposing upon the grantees the duty of beginning within a reasonable time under pain of forfeiture

Id. at 442.

that “[f]orfeitures are not favored either at law or in equity. A forfeiture from its nature implies the taking away from one of some pre-existing right, and this the courts will never do unless the equities of the situation are such there is no way to avoid it.”⁵²

Although disfavored, forfeiture clauses in mineral leases are enforceable.⁵³ Yet “courts are always slow and reluctant to declare or enforce a forfeiture, and in the interpretation of a forfeiture clause in a contract will strictly construe it against the party who has invoked it and claims the right of forfeiture.”⁵⁴ Forfeitures have been found for failure to pay the minimum royalties required by the terms of the lease,⁵⁵ for failure to mine coal for a period of six months,⁵⁶ for failure to commence mining operations “within a reasonable time,”⁵⁷ for permitting the property to lay idle for thirty successive days,⁵⁸ for failure to commence

⁵² *Hogg v. Forsythe*, 248 S.W. 1008, 1011 (Ky. 1923).

⁵³ *E.g.*, *Wender Blue Gem Coal Co. v. Louisville Property Co.*, 125 S.W. 732 (Ky. 1910). This Court enforced the forfeiture clause only after reviewing the surrounding circumstances in order to justify terminating the lease. *Id.* at 735.

⁵⁴ *See Hogg v. Forsythe*, 248 S.W. at 1011. The court in *Hogg* added that “the forfeiture will not be declared except under the strict and literal terms of the instrument.” *Id.* *See also Langford v. Hughes*, 214 S.W.2d 1011, 1012-13 (Ky. 1948); *Addison v. Brandenburg*, 260 S.W. 381, 385 (Ky. 1924).

⁵⁵ *See, e.g.*, *Gorman v. Lusk*, 109 S.W.2d 625 (Ky. 1937) (lease provided that the lessee was not required to pay the minimum royalty in the event of a riot; as lessee did not pay because of a strike, the lease was held to have been forfeited); *Union Gas & Oil Co. v. Wright*, 255 S.W. 697 (Ky. 1923) (lessee failed to tender minimum royalties until several days after period for payment had expired); *Blue Ridge Coal Co. v. Hurst*, 244 S.W. 892 (Ky. 1922) (lease held forfeited although failure to pay minimum royalty was due to the fact that the mine could not be operated profitably because of government price ceilings on coal); *Wender Blue Gem Coal Co. v. Louisville Property Co.*, 125 S.W. at 732 (minimum royalty long past due, lessee insolvent, profitability of the mine speculative, and various liens asserted against the property).

⁵⁶ *See Marcum v. Brock*, 257 S.W.2d 55 (Ky. 1953).

⁵⁷ *Johnson v. Everidge*, 308 S.W.2d 433 (Ky. 1957). The lease had been executed on March 16, 1955. As the lessees had not commenced mining by September 6, 1955, the lessors asserted that the lease had been forfeited. The trial court allowed the lessees until July 15, 1956, to begin mining. The lessees did not comply. In holding the lease forfeited, the Court of Appeals stated that “[u]nder the circumstances peculiar to this case the [lessees] were given a full measure of (and perhaps more than) ‘a reasonable time’ to begin mining operations.” *Id.* at 434-35.

⁵⁸ *See Trumbo v. Persons*, 118 S.W. 916 (Ky. 1909).

mining within twelve months⁵⁹ and for failure to diligently mine.⁶⁰

These last five situations in which the lessee was held to have forfeited the lease involved the breach of an express covenant to mine diligently.⁶¹ However, the Court has sometimes held that a coal lessee is subject to implied covenants. A lease in which no minimum rental is set out⁶² and which contains no express covenant to mine diligently carries implied covenants, on the part of the lessee, to mine diligently⁶³ or to begin development within a reasonable time.⁶⁴ This obligation, although implied, "is as much

⁵⁹ See *Kentucky Diamond Mining & Developing Co. v. Sellars*, 136 S.W. 1016 (Ky. 1911) (forfeiture implied because no attempt was made to comply with the terms of the agreement for 24 years).

⁶⁰ See *North Star Co. v. Howard*, 341 S.W.2d 251, 254 (Ky. 1960).

⁶¹ A typical coal lease will contain many express covenants on the part of the lessee. Common covenants require the lessee to comply with all applicable laws; to indemnify the lessor for claims, damages and losses caused by the lessee's operations; to carry liability insurance; and not to assign or sublet the lease without the consent of the lessor. Ross, *Coal and Coal Leases*, 1977 REPORT OF SEMINAR ON MINERAL LAW, UNIVERSITY OF KENTUCKY 8-9 (Oct. 28-29, 1977). Provided the lease contains a forfeiture clause, forfeiture may be had for the breach of any express covenant.

⁶² If the lease includes a provision for the payment of a minimum royalty, Kentucky imposes no obligation to mine diligently. The minimum royalty is viewed as the standard of diligence set by the parties themselves. See *Cawood v. Hall Land & Mining Co.*, 168 S.W.2d 366, 370 (Ky. 1943). This rule, that there is no implied covenant to mine with due diligence if the lease contains a minimum royalty, governs even if the royalty is a nominal amount, such as one dollar per acre. See *L.E. Cooke Corp. v. Hayes*, 549 S.W.2d at 837. The leases under consideration in that case provided a royalty of twenty-five cents per ton for every ton of coal mined with a minimum royalty of one dollar per acre per year.

Cooke also stands for the proposition that the lessor may require the lessee to begin mining, even though the coal lease contains no express or implied covenant to do so. The court stated:

In the absence of contractual duty relative to commencing development, there is no obligation on the part of the lessee to commence the actual operations unless and until lessors have given sufficient notice demanding the same within a reasonable time thereafter; and, in addition thereto, if the lessee fails to comply therewith, the lessor shall then have the right to seek an end to the contract.

Id. at 839. This demand-for-development rule was first applied to oil and gas leases. As authority for the rule, the court cited two oil and gas cases: *Cameron v. Lebow*, 338 S.W.2d at 399, and *Monarch Oil, Gas & Coal Co. v. Richardson*, 99 S.W. 668 (Ky. 1907). The court in *Cooke* was the first to apply the rule to a coal lease.

⁶³ See *Bardhill v. Sellers*, 298 S.W.2d 5 (Ky. 1956); *Cawood v. Hall Land & Mining Co.*, 168 S.W.2d at 366; *Eastern Ky. Mineral & Timber Co. v. Swann-Day Lumber Co.*, 146 S.W. at 438; *Breckenridge Asphalt Co. v. Richardson*, 146 S.W. 437 (Ky. 1912).

⁶⁴ See *Moore v. Nickles*, 463 S.W.2d 631 (Ky. 1971); *Kentucky Rock Asphalt Co. v. Milliner*, 27 S.W.2d 937 (Ky. 1930).

a part of the contract as though it were plainly written therein,"⁶⁵ and courts will declare a forfeiture for breach of it. Two reasons are generally advanced for imposing these implied covenants. First, public policy favors the development of mineral resources;⁶⁶ if such an obligation is not imposed, this policy could be frustrated. Second, with such a lease, the lessor receives nothing unless the lessee actually mines; if the obligation is not imposed, the lessee could hold the lease indefinitely to the perpetual frustration of the lessor.⁶⁷ Not only does the lease carry an implied covenant to mine diligently upon breach of which the lease may be forfeited, but so long as the lease is executory, it may be cancelled at the option of the lessor.⁶⁸

⁶⁵ *Cawood v. Hall Land & Mining Co.*, 168 S.W.2d at 370. Therefore, if the lessor sues on the basis of the express contract, the written lease, he or she may still have recovery on the implied obligation. It is only upon implied contracts imposed by the law without regard to the assent of the party bound that no recovery may be had when the action is upon an express contract. *Id.*

⁶⁶ *E.g.*, *Davenport v. Schoenfelt*, 229 S.W. 1043 (Ky. 1921). The Court stated: Our public policy demands progressive development of all our mineral resources, such as oil, gas, coal, and other mineral [sic], and long term leases held by persons who do not in good faith contemplate early development are not and should not be countenanced by the courts, where they hinder or delay the progress of industry. *Id.* at 1044.

⁶⁷ *E.g.*, *Killebrew v. Murray*, 151 S.W. 662, 667 (Ky. 1912). The Court quoted a most eloquent expression of this reason from *Chauvenet v. Person*, 66 A. 855 (Pa. 1907):

Generally, all leases of land for the exploration and development of minerals are executed by the lessor in the hope and upon the condition, either express or implied, that the land shall be developed for minerals, and it would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold under it any considerable length of time without making any effort at all to develop it according to the express or implied purpose of the lease; and in general, while equity abhors a forfeiture, yet when such forfeiture works equity, and is essential to public and private interests in the development of minerals in land, the landowner, as well as the public, will be protected from the laches of the lessee and the forfeiture of the lease allowed, where such forfeiture does not contravene plain and unambiguous stipulations in the lease.

151 S.W. at 667.

⁶⁸ *See Berry v. Walton*, 366 S.W. 173 (Ky. 1963). The lease under consideration did not "place on the lessee any express obligation except to account for and pay a royalty on whatever quantity of material he may remove." *Id.* In holding that the lease was terminable at the will of the lessor, the Court stated that "[e]ven with a specific term, if a party has given no consideration for a contract under which he is free to perform or not, as he sees fit, it lacks mutuality and, to the extent that it remains unexecuted, is terminable at

In order to have a forfeiture declared, the lessor must comply with certain notice requirements. If seeking forfeiture for the breach of an express obligation, the lessor must give the lessee that notice which is required by the terms of the lease.⁶⁹ This is merely another manifestation of the rule that the forfeiture clause will be strictly construed against the party seeking to invoke its terms.⁷⁰ However, a lease which contained a self-executing forfeiture clause⁷¹ was held not to require any notice by the lessor as a condition precedent to forfeiture.⁷² Generally, a lessor will want to give notice of an election to forfeit even if such notice is not explicitly required by the lease.⁷³ For this purpose, it has been held that the filing of a petition in the circuit court was sufficient notice of an election to have the lease forfeited.⁷⁴

If the lessor seeks forfeiture based on the breach of an implied covenant to mine with due diligence

the lessor must have put the lessee in default by making definite and unequivocal demand of him that he do so within a reasonable time, or by giving that character of notice that compliance with the implied covenant is required. That is a condition precedent to the maintenance of a suit to forfeit, and the burden is upon the lessor to prove it.⁷⁵

the will of the other party." *Id.* See also *Powell v. Ward*, 280 S.W. 151, 152-53 (Ky. 1926); *Daniel Boone Coal Co. v. Miller*, 217 S.W. 666 (Ky. 1920); *Soaper v. King*, 180 S.W. 46 (Ky. 1915); *Killebrew v. Murray*, 151 S.W. at 662; *Berry v. Frisbie*, 86 S.W. 558 (Ky. 1906); *L. E. Cooke Corp. v. Hayes*, 549 S.W.2d at 837.

⁶⁹ See, e.g., *Casteel v. Heffner*, 170 S.W.2d 880 (Ky. 1943); *Lowe v. Broad Bottom Mining Co.*, 238 S.W. 192 (Ky. 1922).

⁷⁰ See note 54 *supra* and accompanying text for a discussion of strict construction of forfeiture clauses.

⁷¹ See *Marcum v. Brock*, 257 S.W.2d 55 (Ky. 1953). The lease merely provided that upon the failure of the lessee to mine for a period of six months, "then and in that event the said lease shall become null and void." *Id.*

⁷² *Id.* In response to the lessees' argument that the leases had never been declared null and void or cancelled by the lessors, the Court stated, "It is apparent on the face of the leases that these provisions for forfeiture are self-executing. Therefore, if [the lessees] failed to comply with the working condition, they have no more rights thereunder." *Id.*

⁷³ See notes 78-96 *infra* and accompanying text for a discussion of possible defenses to forfeiture by the lessee. If the lessor does not give notice and the lessee continues to work, the lessor may be held to have waived his right to forfeiture or may be estopped from asserting it.

⁷⁴ *Cassidy v. E.M.T. Coal Co.*, 264 S.W. 744, 747 (Ky. 1924).

⁷⁵ *Sapp v. Massey*, 358 S.W.2d 490, 493 (Ky. 1962). This case involved an oil and gas lease, but the rule set out by this Court has been applied to coal leases. See *Kentucky Coke Co. v. Smith*, 269 S.W. at 559.

This rule imposes a rather strict requirement on the lessor.⁷⁶ The lessor must give explicit notice demanding that the lessee commence production within a reasonable time; no other notice will entitle the lessor to a forfeiture.⁷⁷

If the lease contains a forfeiture clause and the lessor believes that the lessee is not complying with the terms of the agreement, forfeiture does not automatically follow. The lessee can assert several defenses. The most obvious defense is compliance with the terms of the lease.⁷⁸ Having failed to comply with such terms, the lessee may prove that non-performance was due to some contingency beyond his or her control,⁷⁹ or that because of the lessor's actions, the lessor is not entitled to a forfeiture.⁸⁰ Equity will not allow a forfeiture if the lessor: did not give the requisite notice,⁸¹ waived his or her right to a forfeiture,⁸² is estopped from declaring a forfeiture⁸³ or is barred by laches from asserting a forfeiture.⁸⁴

The lessor may waive the right to forfeiture. Essentially, this is brought about by the lessor's "failure to insist on compliance

⁷⁶ This may be one reason the lessor, if possible, would want to seek cancellation of the lease as an executory, unilateral, unenforceable contract. To so cancel, notice need be given only of the lessor's decision to terminate; no unequivocal demand for production is required. For a discussion of unenforceable contracts, see note 68 *supra* and accompanying text.

⁷⁷ See *L.E. Cooke Corp. v. Hayes*, 549 S.W.2d at 837. The lessor had sent letters to the lessee, but the court did "not feel that they in any wise comport[ed] with the definition of notice as set forth in *Cameron v. Lebow*." *Id.* at 839. In the case of *Cameron v. Lebow*, 338 S.W.2d at 405, the Court imposed a notice requirement identical to that set out in *Sapp v. Massey*, 358 S.W.2d 490, 492-93 (Ky. 1962).

⁷⁸ See *Carlton v. Kentucky Ridge Coal Co.*, 112 F. Supp. 371 (E.D. Ky. 1953) (lessee had paid minimum royalty in accordance with the provisions of the contract).

⁷⁹ See *Blue Ridge Coal Co. v. Hurst*, 244 S.W. at 892. The Court stated that "ordinarily a court of equity will relieve against the forfeiture of a contract . . . where the circumstances shown justify such an interposition." *Id.* at 893. See also *Marcum v. Brock*, 257 S.W.2d at 56 (lessee must allege performance of the working condition or an excuse for non-performance).

⁸⁰ Cf. *Bond v. Jackson County Coal Co.*, 106 F. Supp. 247 (E.D. Ky. 1952) (forfeiture allowed as lessee did not prove the elements of estoppel or laches).

⁸¹ For a discussion of the requirement of notice, see text accompanying notes 69-77 *supra*.

⁸² For a discussion of waiver, see text accompanying notes 85-88 *infra*.

⁸³ For a discussion of estoppel, see text accompanying notes 89-94 *infra*.

⁸⁴ For a discussion of laches, see text accompanying notes 95-96 *infra*.

[with the provisions of the agreement and by] continued acceptance of royalties under the lease as though all its terms were being complied with.”⁸⁵ Continued acceptance of royalties is the most common action which leads to the inference that the lessor has waived his or her right to forfeiture.⁸⁶ A waiver also may be shown by the conduct and language of the lessor.⁸⁷ Finally, although forfeiture may be waived for failure to insist upon the payment of royalties in compliance with the terms of the lease, such a waiver does not act as a bar to the lessor’s right to collect those royalties.⁸⁸

Similar to waiver of forfeiture is the concept that the lessor may be estopped from asserting a forfeiture. In *P. V. & K. Coal Co. v. Kelly*,⁸⁹ the Court stated:

Equitable estoppel . . . is the principal [sic] by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such a denial or contrary assertion were allowed.⁹⁰

As to coal leases, estoppel is applied “where it is found that it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit.”⁹¹ Thus, in *P. V. & K. Coal Co.*, the lessors were estopped from asserting forfeiture even though the lessee

⁸⁵ *Simmerman v. Fort Hartford Coal Co.*, 221 S.W.2d 442, 444 (Ky. 1949).

⁸⁶ *See Litteral v. Spurlock*, 253 S.W.2d 236 (Ky. 1952); *Simmerman v. Fort Hartford Coal Co.*, 221 S.W.2d at 444.

⁸⁷ *See Robinson v. Bailey*, 128 S.W.2d 179, 181 (Ky. 1939) (the lessor had full knowledge and approved of lessee’s transfer of lease without required written consent); *Hogg v. Forsythe*, 248 S.W. at 1011 (waiver of forfeiture by conduct and language); *Staford v. Pinson*, 134 S.W. 909, 910-11 (Ky. 1911) (waiver of forfeiture by conduct).

⁸⁸ *See Criscillis v. Caudill Coal Co.*, 295 S.W. 1073, 1074 (Ky. 1927).

⁸⁹ 191 S.W.2d 231 (Ky. 1945).

⁹⁰ *Id.* at 234 (citing 19 AM. JUR. *Estoppel* § 19 (1948)).

⁹¹ 191 S.W.2d at 234. *See Roberts v. Babb*, 137 S.W.2d 1112, 1116 (Ky. 1940).

had not paid the full royalty. Because the lessor did not complain, the lessee expended large sums of money, time and effort instead of seeking cancellation of the lease.⁹² The lessor will not be estopped from asserting a forfeiture, however, if he or she has no knowledge that the lessee's acts are inconsistent with the lease.⁹³ Also, silence alone does not constitute estoppel.⁹⁴

Finally, the doctrine of laches may bar the lessor from asserting a forfeiture. As one court stated, laches "contemplates a delay that is unreasonable under the circumstances, during which period material changes in conditions or the relations of the parties were induced or resulted, and where it would be unjust and inequitable to the adverse party to disturb the status quo thus created."⁹⁵ Again, in *P. V. & K. Coal Co.*, the lessors had accepted the payment from the lessee for more than twenty-five years. The delay of the lessors in asserting their claim of forfeiture gave rise to laches.⁹⁶

CONCLUSION

Although in theory a lease may still be abandoned, as a practical matter, the difficulty of proving the requisite intention severely limits the lessor's ability to have the lease cancelled due to abandonment.⁹⁷ In fact, since 1949, Kentucky's highest court has not held any coal lease to have been abandoned.⁹⁸

Because a claim of abandonment is no longer a viable method of enabling a lessor to regain possession of property, cancellation due to forfeiture is the lessor's better means of ensuring diligent and capable development of his property. But—and it

⁹² 191 S.W.2d at 234.

⁹³ See *Buchanan Coal Co. v. Manis*, 245 S.W.2d 921, 924 (Ky. 1951).

⁹⁴ *Walter Bledsoe & Co. v. Elkhorn Land Co.*, 219 F.2d at 557.

⁹⁵ *Id.* at 559. See *Barrowman Coal Corp. v. Kentland Coal & Coke Co.*, 196 S.W.2d at 432-34; *P. V. & K. Coal Co. v. Kelly*, 191 S.W.2d at 233-34.

⁹⁶ 191 S.W.2d at 233.

⁹⁷ For a discussion of proof of intent to abandon, see text accompanying notes 13-41 *supra*.

⁹⁸ The last decision finding an abandonment was *Ellis v. McCormack*, 218 S.W.2d at 391. Cf. *Holladay v. Peabody Coal Co.*, 560 S.W.2d 550, 555 (Ky. 1977) (the Court held that a coal deed with a reverter clause had not been abandoned despite the failure of the coal company to mine for more than 30 years).

cannot be stressed too much—a court will not decree a forfeiture unless the lease contains a forfeiture clause.⁹⁹ Only rarely has the Court held that coal leases contain implied covenants.¹⁰⁰ Therefore, the lessor should insert into the contract those provisions which are necessary to protect his or her interest. Only by so doing is the coal lessor assured of adequate development of his or her coal.

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⁹⁹ For a discussion of this requirement, see text accompanying note 51 *supra*.

¹⁰⁰ See notes 62-68 and accompanying text for a discussion of implied covenants. The only covenant which will be implied into a coal lease (and then only if the lease does not include a provision for the payment of minimum royalties) is one to mine diligently. See note 62 *supra* for a fuller discussion. Oil and gas leases, on the other hand, may contain several implied covenants. See generally R. HEMINGWAY, *THE LAW OF OIL AND GAS* § 8.1 (1971).

